UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

NANCY OTIS,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 98-0187-B
	)	
TOWN OF MADISON, et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION

This is an employment discrimination action asserting claims under Title VII, 42 U.S.C. sec. 1983, the Maine Human Rights Act, and Maine common law. The Defendants remaining in the action at the time this Motion for Summary Judgment was filed are the Town of Madison and Harley Dunlap, the former Chief of Police for the Town of Madison. Plaintiff has since been granted leave to file a Second Amended Complaint to add two new named Defendants. These two new Defendants are not party to this Motion for Summary Judgment.

Discussion

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court views

the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993). "A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law, and the evidence is 'sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.'" *De-Jesus-Adorno v. Browning Ferris Ind. Of Puerto Rico*, 160 F.3d 839, 841-42 (1st Cir. 1998) (quoting *National Amusements v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995)).

Statement of Facts

The parties provide contradictory evidence about virtually every conversation alleged to have occurred regarding Plaintiff's employment with the Madison Police Department. The Court accepts Plaintiff's version of these events, to the extent it is supported by the record, for purposes of this Motion for Summary Judgment.[1] The facts presented in this light are as follows:

1. Otis was hired by Madison as a reserve police officer on May 5, 1995. Otis was interviewed by then-Chief of Police Dunlap, and was offered a reserve officer position shortly after the interview. During the interview, Otis was

[1] The Court was unable to accept several of Plaintiff's factual assertions for her failure to include a citation to supporting evidentiary material. In other cases, the material cited did not provide support for the proposition for which it was offered.

asked about the strength of her marriage, whether her husband minded her working with men, and whether she planned to have children. Fearing she would not be hired if she refused to answer the questions, Otis responded favorably. Chief Dunlap told her he was pleased with her answers, because the Department had experienced problems in the past with a sexual relationship between patrol officers.

2. At the time of her hire, the Madison Police Department employed only one woman; Patricia Woodward, a secretary/dispatcher who was also a reserve police officer. Woodward did little as a reserve officer other than once per week serving as the court officer at arraignments, as she was the full time dispatcher, and Chief Dunlap wanted to avoid giving her overtime duty.

3. In about June, 1995, Sergeant Lewis Gordon asked Otis's husband how he felt about his wife working alone with men at night, how he would feel if she were called to work with men in the middle of the night, even when "she might be wearing a slinky little dress," and indicated that he would never let his wife do police work with all the men.

4. In about June, 1995, Gordon told Otis that, "in the eyes of the community, female police officers are either lesbians or are having sex with someone within the department."

5. A mandatory requirement of a Madison reserve officer was qualification "with the weapon he/she carries on duty." In October, 1995, the Town changed its service weapon from a .357 "wheel-gun" revolver to a Beretta semi-automatic pistol. As part of the transition to the Beretta, all regular and reserve officers, including Otis, attended four hours of classroom training and eight hours of range training. At the end of the range training, all officers, including Otis, were required to qualify with the Beretta by shooting a score of 40 out of 50 shots on at least two out of three targets. All qualifying scores were to be observed and verified by Maine State Police Trooper Ron Moody, a certified firearms instructor. Otis and another officer, Paul Clukey, failed to qualify with the Beretta. Otis and Clukey unsuccessfully attempted to qualify again on December 6, 1995, and Otis is recorded as having failed to qualify on November 13, 1995, although Otis believed she was only practicing on this date and was not told otherwise until later.[2] Because Otis and Clukey failed to qualify, they were suspended by then-Town Manager Michaud.[3]

---

[2] Defendants acknowledge that Plaintiff was only shooting a practice round with Gordon in November, 1995.

[3] The evidence cited by Otis in support of her contention that the suspension was done "at the urging of Sgt. Lewis Gordon," Michaud Aff. ¶ 4, does not provide that support.

6. Dunlap did not qualify the first time he tried with the Beretta. Two other officers did not appear for Moody's training and qualification rounds in 1995. One resigned after Dunlap offered him the choice of qualifying or resigning. The other finally qualified after Dunlap "really got after" him. Neither was disciplined by the Town.

7. Officer Joseph Mitchell was suspended from his duties training others in firearm use during 1995 because of two incidents in which he had improperly discharged his weapon. He was not suspended from his general police duties, and he was allowed to recertify as Firearms Officer in May, 1996.

8. In early January, 1996, Otis learned she was pregnant and told Dunlap, Gordon, and others at work. At various times thereafter, Dunlap and Gordon repeatedly asked her if she intended to return to work after having the baby, and told her mothers should stay home. Gordon said he did not allow his wife to work.

9. In about January, 1996, Corporal David Trask offered to train Otis, on his own time, on the Beretta. Otis was not permitted to practice with a Madison service Beretta, perhaps due to concerns about potential liability. Believing she would be given another chance to qualify, Otis borrowed a [Ruger] firearm from another officer, bought ammunition, targets and range time, and set up targets

in her back yard, all at a personal cost of hundreds of dollars when she was on unpaid suspension. Throughout January and February, 1996, Otis repeatedly asked Dunlap and Gordon for a retest, but received no response. By February, 1996, Otis had shot to qualifying standards on a semi-automatic Ruger, as tested by Trask, but the Town refused to accept her passing scores. On February 23, 1996, Otis met with Michaud and asked to retest before her pregnancy advanced. Michaud told her she would have to wait until the Town had a certified firearms instructor, and he did not know when that would be.

10. The Town's next qualification round was in May, 1996. Otis could not attend because her advanced pregnancy made her unable to fit in her ammunition belt and move properly, and she was medically limited from shooting. To this day, she has never attempted to qualify with the Beretta.

11. Pursuant to General Order 2-1, the Town could have permitted Otis to carry the Smith & Wesson revolver or the Ruger semi-automatic she had practiced with. Officer Phil Campbell was allowed to qualify on his personally-owned Ruger semi-automatic. No one told Otis she could qualify with the Ruger she practiced with.[4]

[4] The Court places little weight on the fact that Plaintiff was not offered a chance to qualify with the Ruger semi-automatic. First, it was not her weapon. Second, her testimony is that after she practiced with the Ruger, and felt ready to try again to qualify, Defendants did not offer her that

12. In April, 1996, the Town posted a job opening for police dispatcher. At that time, Otis was still under suspension from the reserve officer job. Otis applied for the dispatcher job, interviewed with Michaud and perhaps Dunlap, and was offered the position, with Dunlap's approval. During the interview she was asked again about whether she intended to return to work after having her baby, and she was told that mothers should stay home with their children. Otis was led to believe she would be able to return to part-time reserve duties in addition to her dispatcher duties, after she firearms qualified, and she accepted the job with that understanding. Otis was unaware at the time that the dispatcher could not be assigned much reserve patrol duty due to overtime constraints.

13. Otis was hired as a probationary employee, which meant she could be terminated at any time during the first six months for any reason without grievance rights.

14. Otis replaced a female (Patricia Woodward) in the dispatcher position, and the job is currently held by a female.

---

opportunity until her pregnancy was too far advanced. At that point, it would have done little good to suggest she try a different weapon.

15. When Otis started as dispatcher, she received approximately one to one and one-half weeks of training from Woodward. The training included filing and recordkeeping, and preparation of the Uniform Crime Reports ["UCR"]. Otis acknowledged that she understood her training.

16. Otis took a medical leave on August 2, 1996. Woodward agreed to work part-time to cover in Otis's absence. Woodward found the files to be badly disorganized and informed Dunlap of that and other problems with Otis's performance as dispatcher. Otis had promised to complete the UCR report, and it had not been done. On August 26, Dunlap called Otis and asked her to return part-time. Dunlap mentioned that there had been a few mistakes in the UCR report, but indicated Woodward would show her how to correct them when she returned from maternity leave.

17. Dunlap conferred with the interim Town Manager, Perley Beane, and on September 20, 1996, Beane directed Dunlap to terminate Otis. Dunlap gave Otis no reason for the termination, explaining that she was not entitled to one because she was a probationary employee. He did not offer her an opportunity to fix the problems identified by Woodward because he wanted to avoid a conflict with Gordon. There is no evidence that Otis was ever made aware of concerns regarding her performance prior to her termination.

18. On September 26, 1996, Otis spoke with Beane, who indicated her termination had "nothing to do with" her performance, and that "things were working out the way they were now" and "that's what [the Town] wanted to do." He indicated she could not appeal the decision.

19. Dunlap gave a list of reasons for Otis's termination as part of the evidence before the Maine Human Rights Commission. He has since indicated that none of the cited reasons would, standing alone, have caused him to discipline or terminate Otis. Otis has not revealed the specific reasons for her termination to prospective employers, citing instead only "poor performance." She has nevertheless been offered at least three non-law enforcement positions. Otis has gotten past the initial application process with one law enforcement agency, the Maine State Police. During her interview with that agency, she was repeatedly asked what had happened in Madison. She was not offered the position.

1. Plaintiff's Claims under Title VII and the Maine Human Rights Act.

Defendants argue that Plaintiff has insufficient evidence with respect to two elements of her claims against the Town of Madison under Title VII and the Maine Human Rights Act. As a preliminary matter, it is necessary in this case to determine the standard under which Plaintiff's claims will be analyzed. Defendants assert that

Plaintiff has only indirect, or circumstantial, evidence of discrimination. Under Defendants' theory, the Court would apply the burden shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). *Ayala-Gerena v. Bristol Myers-Squibb*, 95 F.3d 86, 95 (1st Cir. 1996). The *McDonnell Douglas* analysis shifts the burden of production back and forth between the parties, while leaving the ultimate burden of proof in Plaintiff's hands. *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 421 (1st Cir. 1996).

Plaintiff, on the other hand, believes she has presented direct evidence of discrimination. In a case involving direct evidence of discriminatory motive, the burden of proof shifts to the defendant, who is then required to prove that it would have made the same decision even in the absence of the discriminatory motive. *Ayala-Gerena*, 95 F.3d at 95-96 (citation omitted).

At first glance, the issue is not easily resolved. Plaintiff has presented evidence of repeated commentary by her two immediate supervisors (Dunlap and Gordon) indicating a strong bias in favor of male patrol officers. These are not exactly "stray remarks," nor were they made in a context removed from the decision-making process, given Plaintiff's evidence that they were made during her employment interviews. *See, Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989) (O'Connor, J., concurring) (indicating that such remarks would not constitute direct

evidence). Further, Dunlap testified he did not offer her a chance to improve her performance prior to taking his concerns to Beane because he wanted to avoid a conflict with Gordon, his second-in-command.

However, this is simply not the type of "smoking gun" evidence which would unquestionably take this case out of the *McDonnell Douglas* framework. *Eg., Wilson v. Susquehanna Township Police Dept.*, 55 F.3d 126, 128 (3rd Cir. 1995). Nor does this Court believe this is circumstantial evidence strong enough to be considered the functional equivalent of direct evidence. Dunlap's concern about a "conflict with Gordon" might imply simply that Gordon did not like Plaintiff personally, or that Gordon favored another person in Plaintiff's position. As one court put it, a plaintiff is only entitled to a direct evidence burden shift after she has proven that discrimination was a "'substantial factor'" in the termination decision. *Walden v. Georgia-Pacific*, 126 F.3d 506, 513 (3rd Cir. 1997) (quoting *Price Waterhouse,* 490 U.S. at 276 (O'Connor, J., concurring)) (citing *Hook v. Ernest & Young*, 28 F.3d 366 (3rd Cir. 1994)). This evidence falls somewhat short of that high hurdle.

The Court will now turn to the particulars of the *McDonnell Douglas* analysis. Under that analysis, Plaintiff must first make a prima facie showing of discrimination, by proving: "(i) that plaintiff is a member of a protected class; (ii) that plaintiff performed his or her job satisfactorily; (iii) that plaintiff was discharged; and (iv) that

plaintiff's position remained open and was eventually filled by persons with plaintiff's qualifications." *Ayala-Gerena*, 95 F.3d at 95 (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993)). The prima facie case having been established, discrimination is presumed, and Defendants are presented with the burden to produce evidence showing a legitimate, non-discriminatory, reason for the termination. *Id*. If Defendants do so, all presumption vanishes, and Plaintiff must prove that Defendants' reason was a pretext for illegal employment discrimination. *Id*.

Defendants first challenge Plaintiff's ability to satisfy the requirements of her prima facie case on the second element: whether she was qualified for the position. The Court is satisfied that Plaintiff has met her minimal burden on this issue. *See, Mesnick v. General Elec.*, 950 F.2d 816, 823 (1st Cir. 1991) (plaintiff's burden on the prima facie portion of her case "not onerous"). Plaintiff's failure to qualify with the Department's service weapon is an insufficient basis for the Court to conclude that she was not performing her reserve patrol duties to her employer's legitimate expectations. Plaintiff was not the only officer suspended for failing to qualify; her allegation is that she was the one not offered a reasonable opportunity to correct that deficiency. Further, she has presented evidence that at least one other officer was permitted to qualify on a weapon other than the Beretta, another opportunity not

offered to her. With respect to the dispatcher position, Plaintiff could hardly have presented evidence that she received favorable performance reviews and similar accolades within the short period she worked as dispatcher. *See, Keisling v. Ser-Jobs for Progress*, 19 F.3d 755, 760 (1st Cir. 1994). Plaintiff was a short-term probationary employee, with one and one-half weeks of training. Under these circumstances, the fact that Plaintiff was never cautioned about her performance during her tenure, and was even told afterward that her termination had nothing to do with her performance, is equally supportive of her claim that she was performing adequately.

Defendants also argue that Plaintiff has insufficient evidence from which a jury could conclude that their stated reason for her termination was pretextual. The Court disagrees. As noted above, Plaintiff has presented evidence that she was not offered the opportunity to qualify on a more familiar weapon, nor was she offered an opportunity to qualify before her pregnancy made it physically impossible. Two male counterparts were not hampered by these factors. She has also offered evidence that her two immediate supervisors, Gordon and Dunlap, regularly queried her about her gender and motherhood and their effect on her work. She testified they led her to believe she could take the dispatcher position without detriment to her ability to return to her patrol duties, when they knew she would not be assigned patrol duties because of limitations on overtime. The evidence shows that Dunlap did not offer her

an opportunity to correct her work deficiencies because he wanted to avoid a conflict with Gordon, but instead he reported the deficiencies to Beane, who then directed Plaintiff be terminated. The Court is satisfied a factfinder could determine both that Defendant's stated reasons for its actions were pretextual, and that they were intended to cover for sex and pregnancy discrimination. *Smith v. Stratus Computer*, 40 F.3d 11, 16 (1st Cir. 1994).

2. Plaintiff's Claims under 42 U.S.C. Section 1983.

Section 1983 imposes civil liability if the Defendants "subjected, or caused to be subjected, [Plaintiff] to the deprivation of any rights, privileges, or immunities secured by the Constitution and law of the United States." 42 U.S.C. § 1983. Plaintiff asserts the deprivation of her rights to equal protection and due process under the Fifth and Fourteenth Amendments to the U.S. Constitution.

A. Procedural Due Process.

In order to state a viable claim for a violation of procedural due process in this case, Plaintiff must show a deprivation of a protectable property interest in her continued employment. *Krennerich v. Inhabitants of the Town of Bristol*, 943 F. Supp. 1345, 1352 (D. Me. 1996). Defendants argue that Plaintiff had no protectable property interest in either of her positions with the Madison Police Department. Plaintiff concedes this is so with respect to the dispatcher position, in which she was

on a probationary status. With respect to the reserve patrol officer position, Defendants assert that Plaintiff was a "temporary" employee, whom the Town could dismiss at any time without cause. Plaintiff disagrees.

The Court finds there is a disputed issue of material fact with regard to whether Plaintiff, as a reserve officer with the Town of Madison, was classified as a "Part-Time Employee" or "Temporary Employee" under the Town's Personnel Policy. Defendant cites the Town's Personnel Policy in support of its position that Plaintiff was only a temporary employee.[5] However, the Personnel Policy references an "official job classification chart," which might have indicated the appropriate classification for reserve officers. The chart apparently no longer exists, if it ever did. The Personnel Policy itself makes no mention of reserve officers. Defendant also notes that Plaintiff, as a reserve officer, did not receive vacation, sick leave, or medical benefits. Temporary employees are not entitled to benefits under the Personnel Policy. However, Plaintiff did receive assistance from Corporal Trask in connection with her grievance about her suspension in late 1995 under a procedure available to non-union employees in the Personnel Policy. That procedure might well be construed as a "benefit" to which temporary employees were not entitled,

[5] Defendants do not argue whether Plaintiff would have a protected property interest in part-time employment.

inasmuch as the Policy provides that temporary employees have "no right to file [a] grievance," even in the case of termination. Finally, Defendant notes that Otis worked for a total of 447.5 hours during 1995, but does not provide documentation of the number of weeks Plaintiff worked. Without that documentation, the Court can draw no conclusions about whether Plaintiff worked "an average of more than 20 hours a week," which level of work helps to define a "Part-Time employee" under the Policy.[6]

Defendants argue in their Reply Memorandum that Plaintiff's claim must also fail because she has not shown that the State's procedure is inadequate. This argument was not presented in the original Motion for Summary Judgment, and accordingly, it will not be addressed here. *See*, D. Me. R. 7(c).

B. Substantive Due Process.

Defendants argue that Plaintiff has presented insufficient evidence that Defendants' conduct was "conscience-shocking" such that she may maintain a claim for a violation of her substantive due process rights. Plaintiff does not address this argument in her responsive pleadings, leading the Court to question whether she intended to pursue a claim under the substantive prong of due process. She does not

[6] Plaintiff has included in her Statement of Material Facts a calculation of 20-25 hours per week for the weeks Plaintiff worked as a reserve officer. The page of the Dunlap Deposition to which Plaintiff refers in support of that calculation was not included with Plaintiff's exhibits.

explicitly say so, however, and the Court is required to address the merits of the argument on summary judgment regardless of Plaintiff's failure to object. *FDIC v. Bandon Assoc.*, 780 F. Supp. 60, 62 (D. Me. 1991) (noting that Federal Rule of Civil Procedure 56 overrides the provision of this Court's local rule providing that a failure to object will be construed to waive objection).

The Court agrees with Defendants that Plaintiff has not provided evidence of conduct rising to the level required to support a substantive due process claim. Defendants' conduct would meet that standard only if it "shocks the conscience" or "offends the community's sense of fair play and decency." *Pittsley v. Warish*, 927 F.2d 3, 6 (1st Cir. 1991) (quoting *Rochin v. California*, 342 U.S. 165, 172, (1952)). In *Pittsley*, the plaintiff children, ages 10 and four, were allegedly told by defendant police officers that if the officers discovered the children's mother's live-in boyfriend on the streets, the children would "never see him again." *Id*. at 5. When the boyfriend was thereafter arrested, the children alleged they were "treated very badly," and were refused permission, in vulgar language, to hug and kiss the boyfriend goodbye. *Id*. The First Circuit Court of Appeals characterized the conduct at issue as "despicable" and "wrongful," and a misuse of authority. *Id*. at 7. The court nevertheless found the conduct did not rise to the level of a constitutional violation.

Id. The Court finds the comments and actions suffered by Plaintiff, an adult, similarly do not rise to that level.

C. Equal Protection.

Plaintiff's claim under the equal protection clause depends upon her ability to show (1) that she was treated differently from other similarly situated employees, and (2) that she was treated differently because of her gender or pregnancy. *Rubinovitz v. Rogato*, 60 F.3d 906, 909 (1st Cir. 1995). As the Court has noted, Plaintiff has indeed presented evidence that she was treated differently from her male counterparts with respect to the weapons qualification requirements. In light of her evidence of highly gender-specific comments by Dunlap and Gordon, the Court is satisfied a jury could conclude that it was due to her gender.

3. Defendant Dunlap's claim of qualified immunity.

Defendant Dunlap asserts that he is entitled to qualified immunity on Plaintiff's section 1983 claim against him. Qualified immunity shields government officers "'from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.'" *Hegarty v. Somerset County*, 53 F.3d 1367, 1373 (1st Cir. 1995) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). The doctrine provides for the "inevitable reality that 'law enforcement officials will in some cases reasonably but mistakenly conclude that

[their conduct] is [constitutional], and . . . that . . . those officials -- like other officials who act in ways they reasonably believe to be lawful -- should not be held personally liable.'" *Id*. (quoting *Anderson*, 483 U.S. at 641).

The qualified immunity inquiry has two prongs. First we must determine whether the right asserted by Plaintiff was clearly established at the time of the contested events. *Id*. at 1373. Defendant does challenge whether the rights here asserted by Plaintiff were clearly established. Rather, he focuses on the second prong: whether, viewing facts in a light most favorable to Plaintiff, "an *objectively* reasonable officer, similarly situated, *could have believed* that the challenged . . . conduct did *not* violate" those clearly established rights. *Hegarty*, 53 F.3d at 1373. (emphasis in original). Defendant's argument on this point is supported by his contention that Plaintiff has adduced no evidence showing a violation of her constitutional rights. As discussed previously, the Court disagrees with that contention. Defendant Dunlap is not entitled to qualified immunity.

4. Defamation.

Defendants challenge Plaintiff's evidence of defamation in several respects, particularly asserting privileges arising from the manner in which Defendants disclosed information about Plaintiff's termination. Plaintiff correctly points out that this Court has determined the State of Maine would recognize a defamation claim

based upon compelled self-publication. *Carey v. Mt. Desert Island Hosp.*, 910 F. Supp. 7, 13 (D. Me. 1995).

Defendant also asserts that Plaintiff has shown no harm resulting from the defamation, as there is undisputed evidence that Plaintiff was later offered at least three jobs, and was only compelled to explain her termination to one prospective employer. However, where the defamation concerns a person's career, no proof of special damages is necessary. *Saunders v. Van Pelt*, 497 A.2d 1121, 1125 (Me. 1985) (citing *Farrell v. Kramer*, 193 A.2d 560, 562 (Me. 1963)). Plaintiff may be entitled to compensatory damages "'for her humiliation, and for such injury to her feelings and to her reputation as have been proved or may reasonably be presumed.'" *Farrell*, 193 A.2d at 562 (quoting *Elms v. Crane*, 107 A. 852, 854) (other citation omitted)).

Conclusion

For the foregoing reasons, I hereby recommend Defendants' Motion for Summary Judgment be GRANTED to the extent Plaintiff's claims in Counts III and VII of the Amended Complaint (III and IV of the Second Amended Complaint) purport to allege violations of substantive due process rights, and DENIED in all other respects.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____

Eugene W. Beaulieu
United States Magistrate Judge

Dated on: August 9, 1999